

CHRISTOPHER WALRATH,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

)
) No. CV-10-3106-CI
)
) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND ORDERING REMAND
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BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 15.) Attorney James D. Tree represents Christopher Walrath (Plaintiff); Special Assistant United States Attorney Robert L. Van Saghi represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **REMANDS** the matter to the Commissioner for additional proceedings.

On August 10, 2007, Plaintiff protectively filed a Title II application for a period of disability and disability insurance benefits. (TR. 12; 116.) Plaintiff also filed a Title XVI application for supplemental security income on August 10, 2007. (Tr. 12; 116.) He alleged disability due to seizures. (Tr. 120.) Plaintiff's claim was denied initially and on reconsideration, and

1 he requested a hearing before an administrative law judge (ALJ).
2 (Tr. 52-69.) A hearing was held on September 3, 2009, at which
3 Vocational Expert Pauline Peterson, and Plaintiff, who was
4 represented by counsel, testified. (Tr. 27-47.) ALJ Douglas S.
5 Stults presided. (Tr. 27.) The ALJ denied benefits on November 27,
6 2009. (Tr. 12-22.) The instant matter is before this court
7 pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. At the time of the
11 hearing, Plaintiff was 23 years old and had finished high school.
12 (Tr. 32.) He lives with one roommate. (Tr. 32.) Plaintiff was
13 raised by his grandmother, and immediately after she committed
14 suicide, he resorted to drinking heavily. (Tr. 34; 39.) After he
15 stopped drinking, he suffered from a grand mal seizure. (Tr. 34;
16 240-42.) Two weeks later, he suffered another seizure that
17 Plaintiff attributed to stress. (Tr. 34.) Plaintiff testified that
18 he was diagnosed with epilepsy, and that as a child, he suffered
19 several petit mal seizures that were misdiagnosed as anxiety
20 attacks. (Tr. 34.)

21 Plaintiff testified that between 2002-2006, while working at
22 Pizza Hut, he routinely suffered epileptic seizures. (Tr. 34.) On
23 September 10, 2007, Plaintiff had a temporal lobectomy that removed
24 his hippocampus. (Tr. 270.) Plaintiff reported that as a result of
25 surgery, his long-standing depression worsened, and he continued to
26 experience seizures about once per month. (Tr. 36-39.) He reports
27 his medications provide little relief. (Tr. 36-37.) Plaintiff was
28 ultimately fired from the job at Pizza Hut in 2006 for making

1 threats to burn the building. (Tr. 35.) Plaintiff testified that he
2 stopped daily marijuana use in February, 2008. (Tr. 40; 208.)

3 **ADMINISTRATIVE DECISION**

4 ALJ Stults found Plaintiff's date of last insured for DIB
5 purposes was December 31, 2011. (Tr. 12.) At step one, he found
6 Plaintiff had not engaged in substantial gainful activity since
7 November 1, 2006. (Tr. 14.) At step two, he found Plaintiff had
8 severe impairments of "epilepsy, status post left temporal
9 lobectomy, September 2007; dementia, related to lobectomy; cognitive
10 disorder, not otherwise specified, provisional; bipolar disorder;
11 rule out borderline personality traits; marijuana abuse; and alcohol
12 and polysubstance abuse, in remission. (Tr. 14.) At step three,
13 the ALJ determined Plaintiff's impairments, alone and in
14 combination, did not meet or medically equal one of the listed
15 impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.
16 §§ 416.920(d), 416.925 and 416.926). (Tr. 16.) In his step four
17 findings, the ALJ found Plaintiff's statements regarding pain and
18 limitations were not credible to the extent they were inconsistent
19 with the RFC findings. (Tr. 19.) He found that Plaintiff retained
20 the RFC to perform light work as defined in 20 C.F.R. §§ 404.1567(b)
21 and 416.967(b) with nonexertional limitations.

22 "The claimant can do no reaching overhead; can perform
23 only simple, repetitive, concrete tasks; no contact with
24 general public; only superficial incidental work-related
25 contact with co-workers; make only simple work-related
26 decisions; deal with only rare (less than 10% of time)
27 changes in work processes or environment with any such
28 change must be presented by demonstration rather than by
writing; avoid exposure to workplace hazards, such as
dangerous moving machinery, unprotected heights, or
operation of moving equipment; no climbing of ropes,
ladders or scaffold; and he would miss one day per month
of work due to impairments or treatment.

1 (Tr. 18.)

2 ALJ Stults found that jobs exist in significant numbers in the
3 national economy that Plaintiff can perform. (Tr. 20.) The ALJ
4 found Plaintiff could work as a cannery worker, peel potato
5 inspector, and agricultural sorter. (Tr. 21.)

6 **STANDARD OF REVIEW**

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
8 court set out the standard of review:

9 A district court's order upholding the Commissioner's
10 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
11 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
12 Commissioner may be reversed only if it is not supported
13 by substantial evidence or if it is based on legal error.
14 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
15 Substantial evidence is defined as being more than a mere
16 scintilla, but less than a preponderance. *Id.* at 1098.
17 Put another way, substantial evidence is such relevant
18 evidence as a reasonable mind might accept as adequate to
19 support a conclusion. *Richardson v. Perales*, 402 U.S.
20 389, 401 (1971). If the evidence is susceptible to more
21 than one rational interpretation, the court may not
22 substitute its judgment for that of the Commissioner.
23 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
24 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
26 resolving conflicts in medical testimony, and resolving
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
31 supports more than one rational interpretation, the court may not
32 substitute its judgment for that of the Commissioner. *Tackett*, 180
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
34 Nevertheless, a decision supported by substantial evidence will
35 still be set aside if the proper legal standards were not applied in

1 weighing the evidence and making the decision. *Browner v. Secretary*
2 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
3 substantial evidence exists to support the administrative findings,
4 or if conflicting evidence exists that will support a finding of
5 either disability or non-disability, the Commissioner's
6 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
7 1230 (9th Cir. 1987).

8 **SEQUENTIAL PROCESS**

9 The Commissioner has established a five-step sequential
10 evaluation process for determining whether a person is disabled. 20
11 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
12 137, 140-42 (1987). In steps one through four, the burden of proof
13 rests upon the claimant to establish a prima facie case of
14 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
15 This burden is met once a claimant establishes that a physical or
16 mental impairment prevents him from engaging in his previous
17 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
18 claimant cannot do his past relevant work, the ALJ proceeds to step
19 five, and the burden shifts to the Commissioner to show that (1) the
20 claimant can make an adjustment to other work; and (2) specific jobs
21 exist in the national economy which claimant can perform. *Batson v.*
22 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
23 If a claimant cannot make an adjustment to other work in the
24 national economy, a finding of "disabled" is made. 20 C.F.R. §§
25 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

26 **ISSUES**

27 Plaintiff contends that the ALJ erred by failing to address the
28 opinion of examining doctor Naomi Chaytor, Ph.D., and by improperly

1 rejecting the opinion of Christopher Clark, M.Ed., LMCH. Plaintiff
2 also argues that the ALJ erred in his credibility determination
3 related to Plaintiff and that the hypothetical and resulting RFC
4 were flawed. (ECF No. 14 at 6-17.) Defendant contends the ALJ's
5 decision is supported by substantial evidence and free of legal
6 error. (ECF No. 16.)

7 DISCUSSION

8 A. Medical Opinions.

9 Plaintiff argues that the ALJ improperly rejected the opinions
10 of Plaintiff's treating and examining medical providers.
11 Specifically, Plaintiff complains that the ALJ erred by failing to
12 discuss the evaluation by Naomi Chaytor, Ph.D. (ECF No. 14 at 10.)
13 Plaintiff also argues that the ALJ erred by dismissing the opinion
14 of Christopher Clark, M.Ed., LMHC, solely because Mr. Clark was not
15 an "acceptable medical source." (ECF No. 14 at 11.)

16 The Defendant responds that Dr. Chaytor's opinion was not a
17 "medical opinion," but instead was an opinion concerning the
18 ultimate issue of disability and, therefore, the ALJ did not need to
19 mention Dr. Chaytor's evaluation in the opinion. (ECF No. 16 at 9-
20 10.) In the alternative, the Defendant responds the failure to
21 address Dr. Chaytor's opinion was harmless error. (ECF No. 16 at
22 10.) Defendant also responds that the ALJ gave proper reasons for
23 rejecting Mr. Clark's opinion. (ECF No. 16 at 11.)

24 In this case, the ALJ gave great weight to the opinion of Dr.
25 Sloop, Plaintiff's treating physician, who indicated Plaintiff had
26 mild mental impairments. (Tr. 19.) The ALJ also gave great weight
27 to the reviewing state psychologists' assessments of the mental
28 impairments, and to the opinion of examining physician Dr. Toews.

1 (Tr. 19.) With regard to physical impairments, the ALJ gave great
2 weight to the April 2009 opinion from Plaintiff's treating
3 orthopedist, Dr. Snyder. (Tr. 20.) The ALJ did not discuss Dr.
4 Chaytor's assessment of Plaintiff.

5 The ALJ must provide "clear and convincing" reasons for
6 rejecting the uncontradicted opinion of either a treating or
7 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
8 1996). Even when a treating or examining physician's opinion is
9 contradicted, that opinion "can only be rejected for specific and
10 legitimate reasons that are supported by substantial evidence in the
11 record." *Id.* at 830-31.

12 In general, more weight is given to a treating physician's
13 opinion than to the opinions of those who do not treat the claimant.
14 See *Lester*, 81 F.3d at 830. On the other hand, an ALJ need not
15 accept the opinion of a treating physician if that opinion is brief,
16 conclusory, and inadequately supported by clinical findings or is
17 not supported by the record as a whole. *Batson*, 359 F.3d at 1195;
18 see also *Red v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002);
19 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). An
20 examining physician's opinion is "entitled to greater weight than
21 the opinion of a nonexamining physician." *Lester*, 81 F.3d at 830-31.

22 **1. Naomi Chaytor, Ph.D.**

23 Dr. Chaytor examined Plaintiff on January 6, 2007. (Tr. 208.)
24 She administered a battery of tests, and concluded that overall,
25 Plaintiff is markedly compromised in his psychosocial functioning.
26 (Tr. 211.) Dr. Chaytor opined that Plaintiff has a long-standing
27 learning disability, and a history of ADHD. (Tr. 211.) Dr. Chaytor
28 also found that Plaintiff met the criteria for several psychiatric

1 disorders, and recommended he begin psychotherapy and psychotropic
2 medication. (Tr. 211.) Dr. Chaytor concluded, "[m]anagement of his
3 psychiatric symptoms will likely lead to greater functional
4 independence, as this appears to be a significant barrier to
5 successful employment." (Tr. 211.)

6 While an ALJ "need not discuss all evidence presented," the ALJ
7 must explain why "significant probative evidence has been rejected."
8 *Vincent on Behalf of Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th
9 Cir. 1984). In this case, the opinion of Dr. Chaytor, an examining
10 physician, is entitled to greater weight than the state reviewing
11 physicians. *Lester*, 81 F.3d at 830-31. Because Dr. Chaytor's
12 opinion is contradicted, the ALJ must provide "specific and
13 legitimate" reasons, supported by substantial evidence in the
14 record, that justify rejecting her opinion. *Id.* at 830-31. The
15 ALJ's failure to provide "specific and legitimate" reasons, or any
16 reasons at all, for rejecting Dr. Chaytor's opinion was error.

17 The Defendant's contention that Dr. Chaytor's opinion need not
18 be discussed because it was an opinion about the ultimate disability
19 determination is not well taken. The Ninth Circuit recognizes that
20 "[i]n disability benefits cases, physicians typically provide two
21 types of opinions: medical opinions that speak to the nature and
22 extent of a claimant's limitations, and opinions concerning the
23 ultimate issue of disability, i.e., opinions about whether a
24 claimant is capable of any work, given her or his limitations."
25 *Holohan v. Massanari*, 246 F.3d 1195, 1202-1203 (9th Cir. 2001).
26 Accordingly, an ALJ may reject a treating physician's uncontradicted
27 opinion on the ultimate issue of disability only with "clear and
28 convincing" reasons supported by substantial evidence in the record.

1 *Holohan*, 246 F.3d at 1202-03. "If the treating physician's opinion
2 on the issue of disability is controverted, the ALJ must still
3 provide 'specific and legitimate' reasons in order to reject the
4 treating physician's opinion." *Id.* As a result, the ALJ's failure
5 to address the opinion was error.

6 Defendant also argues that the failure to address Dr. Chaytor's
7 opinion was harmless error. An error is harmless if it is
8 "inconsequential" to the ALJ's "ultimate nondisability
9 determination." *Stout v. Commissioner, Social Security Admin.*, 454
10 F.3d 1050, 1055 (9th Cir. 2006). In this case, Dr. Chaytor opined
11 that Plaintiff was unable to work and, thus, the opinion cannot be
12 classified as "inconsequential" to the ultimate nondisability
13 determination. The ALJ's failure to address the opinion does not
14 constitute harmless error.

15 **2. Christopher Clark, M.Ed., LMHC**

16 Plaintiff also argues that the ALJ erred by rejecting the
17 opinion of Christopher Clark, M.Ed., LMCH, simply because he is a
18 non-accepted medical source. The ALJ stated he rejected the March
19 2007 opinion from "the licensed mental health clinician" because the
20 opinion was not "from an acceptable medical source and [was]
21 inconsistent with findings of the acceptable medical sources, Dr.
22 Toews and Dr. Sloop." (Tr. 20.)

23 Mr. Clark completed a Psychological/Psychiatric Evaluation on
24 March 5, 2007. (Tr. 407-12.) Mr. Clark assessed Plaintiff with
25 marked impairments in his ability to (a) understand, remember, and
26 follow complex (more than two step) instructions; (b) exercise
27 judgment and make decisions; (c) relate appropriately to co-workers
28 and supervisors; (d) interact appropriately in public contacts; (e)

1 respond appropriately to and tolerate the pressure and expectations
2 of a normal work setting; and (f) control physical or motor
3 movements and maintain appropriate behavior. (Tr. 409.) Mr. Clark
4 also indicated that Plaintiff had several moderate impairments.
5 (Tr. 409.)

6 An ALJ is required to consider all of the evidence available in
7 a claimant's case record, including evidence from medical sources.
8 42 U.S.C. § 423(d)(5)(B); see also 20 C.F.R. § 404.1527(d)
9 ("Regardless of its source, we will evaluate every medical opinion
10 we receive."). The term "medical sources" refers to both
11 "acceptable medical sources" and other health care providers who are
12 not acceptable medical sources. See 20 C.F.R. §§ 404.1502 and
13 416.902. In addition to evidence from the acceptable medical
14 sources, the ALJ is required to review evidence from other sources
15 to establish the severity of a claimant's impairments and how it
16 affects the claimant's ability to work. 20 C.F.R. § 404.1513(d).

17 Although an ALJ may give less weight to the opinions of those
18 who are not acceptable medical sources than to those who are, the
19 ALJ did not do this, but rather rejected Mr. Clark's assessment
20 solely on the basis that he was not an acceptable medical source.
21 See *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996); 20 C.F.R.
22 § 404.1513(a), (d), 20 C.F.R. § 416.913(a), (d). However, in
23 certain circumstances, an opinion from a medical source who is not
24 an "acceptable medical source" may outweigh the opinion of an
25 "acceptable medical source," including the medical opinion of a
26 treating source. . . ." Social Security Ruling ("SSR") 06-03p. The
27 ALJ's dismissal of Mr. Clark's assessment based on the fact that he
28 was not an acceptable medical source was error.

1 The second reason the ALJ cited for dismissing Mr. Clark's
2 assessment was that his opinion was "inconsistent with findings from
3 acceptable medical sources, Dr. Toews and Dr. Sloop." (Tr. 20.)
4 "The ALJ may reject the opinion of a treating physician in favor of
5 a conflicting opinion of an examining physician if the ALJ makes
6 'findings setting forth specific, legitimate reasons for doing so
7 that are based on substantial evidence in the record.'" *Thomas v.*
8 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). The ALJ can "meet this
9 burden by setting out a detailed and thorough summary of the facts
10 and conflicting clinical evidence, stating his interpretation
11 thereof, and making findings." *Id.* Although the ALJ may have found
12 "specific, legitimate reasons" to dismiss Mr. Clark's conclusions,
13 he did not address in his written decision. See *Thomas*, 278 F.3d at
14 957. The ALJ's unsupported assertion that Mr. Clark's assessment
15 contradicts the medical opinions of Dr. Toews and Dr. Sloop, without
16 more, is inadequate and constitutes error.

17 **B. Credibility.**

18 Plaintiff argues that the ALJ erred in finding Plaintiff's
19 testimony not credible. (ECF No. 14 at 13.) The Defendant responds
20 that the ALJ provided clear and convincing reasons to support the
21 adverse credibility finding. (ECF No. 16 at 12.)

22 The ALJ is responsible for determining credibility and
23 resolving ambiguities and conflicts in the medical evidence. See
24 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Where the
25 medical evidence in the record is not conclusive, "questions of
26 credibility and resolution of conflicts" are solely the functions of
27 the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).
28 In resolving questions of credibility and conflicts in the evidence,

1 an ALJ's findings "must be supported by specific, cogent reasons."
2 *Reddick*, 157 F.3d at 725. The ALJ can do this "by setting out a
3 detailed and thorough summary of the facts and conflicting clinical
4 evidence, stating his interpretation thereof, and making findings."
5 *Id.* In other words, the ALJ "must identify what testimony is not
6 credible and what evidence undermines the claimant's complaints."
7 *Lester*, 81 F.3d at 834; see also *Dodrill v. Shalala*, 12 F.3d 915,
8 918 (9th Cir. 1993).

9 In this case, the ALJ concluded that Plaintiff's statements
10 about the intensity, persistence and limiting effects of his
11 symptoms were not credible. (Tr. 19.) The ALJ explained that the
12 medical evidence indicates that Plaintiff has "residuals from
13 surgery, seizures and his history of substance abuse." (Tr. 19.)
14 In discounting Plaintiff's credibility, the ALJ simply stated "[t]he
15 above residual functional capacity takes into full account the
16 claimant's credible allegations of limitations caused by pain, side
17 effects of medication of seizures and medication, residuals of
18 surgery and depression." (Tr. 19.)

19 The ALJ failed to identify the testimony he found not credible,
20 and failed to identify evidence that undermines the Plaintiff's
21 complaints. As a result, the ALJ's credibility determination is not
22 supported by specific, cogent reasons and the credibility
23 determination must be revisited on remand.

24 **C. Step Five.**

25 Plaintiff argues that the hypothetical posed to the VE was
26 incomplete and as a result, Plaintiff's RFC was not accurate. (ECF
27 No. 14 at 16.) The Defendant responds that the RFC accounts for all
28 of Plaintiff's credible physical and mental limitations. (ECF No.

16 at 14.) On remand, after the ALJ properly assesses the medical evidence and Plaintiff's credibility, if necessary, the ALJ should make a new residual functional capacity finding and obtain additional testimony from a vocational expert.

5 **D. Remedy**

6 The ALJ failed to provide sufficient reasons for rejecting the
7 opinions of Dr. Chaytor and Mr. Clark. Two remedies exist where
8 there is a failure to provide adequate reasons for rejecting the
9 opinions of a treating or examining physician. The general rule is
10 that "we credit that opinion as a matter of law." *Lester*, 81 F.3d
11 at 834. Alternatively, the court may remand to allow the ALJ to
12 provide the requisite "specific" and "legitimate reasons" for
13 disregarding the opinion. *McAllister v. Sullivan*, 888 F.2d 599 (9th
14 Cir. 1989); *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir.
15 2004)(court has flexibility in crediting testimony if substantial
16 questions remain as to claimant's credibility and other issues).
17 Where evidence has been identified that may be a basis for a
18 finding, but the findings are not articulated, remand is the proper
19 disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990).
20 In this case, there may be evidence in the record which the ALJ
21 could cite to provide the requisite specific, legitimate reasons for
22 rejecting the opinions of Dr. Chaytor and Mr. Clark, and for
23 discounting Plaintiff's credibility, so remand is the proper remedy.

24 **CONCLUSION**

25 Having reviewed the record and the ALJ's findings, the court
26 concludes the ALJ's decision is not supported by substantial
27 evidence and is based on legal error. On remand, the ALJ should
28 reconsider the opinions of Dr. Chaytor and Mr. Clark and support his

1 findings with specific, legitimate reasons supported by substantial
2 evidence in the record. The ALJ should also reconsider Plaintiff's
3 credibility and provide detailed findings indicating what testimony
4 is not credible and discussing the evidence that undermines the
5 Plaintiff's complaints. If necessary, the ALJ should make a new
6 residual functional capacity finding and obtain additional testimony
7 from a vocational expert. Accordingly,

8 **IT IS ORDERED:**

9 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
10 **GRANTED** and the matter is **REMANDED** to the Commissioner for
11 additional proceedings.

12 2. Defendant's Motion for Summary Judgment (**ECF No. 15**) is
13 **DENIED**;

14 3. An application for attorney fees may be filed by separate
15 motion.

16 The District Court Executive is directed to file this Order and
17 provide a copy to counsel for Plaintiff and Defendant. Judgment
18 shall be entered for Plaintiff, and the file shall be **CLOSED**.

19 DATED August 1, 2012.

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21 S/ CYNTHIA IMBROGNO
22 UNITED STATES MAGISTRATE JUDGE
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